BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ARNOLDO RIVERA	)	
Claimant	)	
	)	
VS.	)	
	)	
JOSTENS PRINTING & PUBLISHING	)	
Respondent	)	Docket No. 261,965
	)	
AND	)	
	)	
CONSTITUTION STATE SERVICE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier, Constitution State Service Company, appealed Administrative Law Judge Bryce D. Benedict's Award dated June 17, 2002. The Board heard oral argument on December 11, 2002.

APPEARANCES

Chris Miller of Lawrence, Kansas, appeared for the claimant. John Carpinelli of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found the claimant suffered a 5 percent functional impairment to the body as a whole based on Dr. Delgado's impairment rating.

Respondent and its insurance carrier raise the following issues on review: (1) whether the claimant's accidental injury arose out of and in the course of employment with the respondent; and, (2) whether the claimant gave timely notice.

The claimant argues the respondent should be assessed an interest penalty pursuant to K.S.A. 44-512b but otherwise requests the Administrative Law Judge's award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant injured his back on June 1, 2000, while working for respondent and handling boxes of books. Claimant worked second shift from 3 p.m. to 11 p.m. The accident occurred at approximately 9 p.m. and claimant rested the last two hours of his shift. Claimant was aware that he was required to report workplace injuries to the respondent, but claimant initially thought he was just tired. The next day he could not walk normally and claimant sought medical treatment from the Shawnee County Health Agency.

After seeing Shawnee County Health Agency for his back on June 2, 2000, claimant took the medical slip that he was given and presented it to one of his supervisors. The slip stated that claimant was able to return to work that same day but that he should not lift over 15 pounds until Monday, June 5, 2000. The claimant contends the supervisor looked at the slip and returned it to claimant. Claimant, who has difficulty speaking and understanding English, testified he thought he was providing notice of his work-related injury to respondent when he presented the medical slip to the warehouse general supervisor and stated: "Last night I feel pain. And this morning, I can't put my shoes on. And I have to go to the clinic, and the doctor gave me this note and pills."[1]

The supervisor, Eric Steinmetz, did not recall claimant coming to him on June 2, 2000, and either telling him he had hurt himself at work or providing him with the medical slip from Shawnee County Health Agency. Mr. Steinmetz testified he had never seen the medical slip and if he had been handed such slip he would have read it and made further inquiry regarding claimant's condition. Lastly, Mr. Steinmetz testified claimant never asked for medical treatment.

Claimant did not work after presenting the medical slip as the company had a decreasing workload and had plans to lay off some of its workers. Claimant was caught in that layoff. Claimant further testified that when he gave the medical slip to his supervisor he was told there wasn't work and he was going to be laid off. The supervisor agreed that because they were running out of work he could have very well told claimant he would be getting laid off in a week or so, but the supervisor reiterated he had never received the medical slip from claimant.

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[1] P.H. Trans. at 22-23.

When claimant first sought medical treatment at the Shawnee County Health Agency on June 2, 2000, the medical record of that visit indicated a history of back pain for five days with no history of trauma. The claimant denied he gave a history of back pain for five days but agreed that he told the doctor he had no history of trauma. Claimant further testified he did not understand what was meant by the phrase "history of trauma."

On June 13, 2000, claimant sought treatment with Dr. R. D. Kleiner with complaints of low back pain with no leg pain. The medical record of that visit indicated an onset of pain two weeks ago while lifting boxes.

On July 12, 2000, claimant met with Kim Anguiano, an employee relations representative for respondent, and reported he had suffered a work-related injury. Claimant told Ms. Anguiano that he was lifting a box and pulled a muscle in his back. Claimant advised Ms. Anguiano that he had been hurt back in June. The conversation was in English and Ms. Anguiano noted it was slower communicating with claimant than with somebody that could speak good English but she understood he was alleging a work-related accident. Ms. Anguiano further testified:

> Q. Did you have any discussions with Mr. Rivera about whether or not he told his supervisor that he was hurt at work?
>
> A. I don't remember his exact or our exact conversation. He just said he was reporting it now. I asked him why he didn't report it then.
>
> Q. What did he tell you?
>
> A. He just said, 'I don't know.'[2]

Claimant was referred to St. Francis Hospital and Medical Center for treatment on July 12, 2000. The medical record of that visit indicates claimant injured his back while lifting a heavy box at work in May.

On December 5, 2001, Dr. Sergio Delgado concluded claimant had suffered a lumbosacral strain. Based on the AMA *Guides,*[3] he rated claimant with a 5 percent whole person impairment based on the DRE Lumbosacral Category II.

Respondent's primary argument is claimant failed to give timely notice of his work-related injury on June 1, 2000, and that he did not establish just cause sufficient to warrant extension of time for giving timely notice.

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[2] P.H. Trans. at 57.

[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

K.S.A. 44-520 provides:

> **Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Initially, it must be determined whether the conversation claimant alleged he had with his supervisor on June 2, 2000, constituted notice of a workplace accident. The ALJ concluded the conversation, if it occurred, did not provide the supervisor with sufficient information to place the respondent on notice that claimant was claiming an accident. The Board agrees.

The claimant testified he advised his supervisor that he had pain the previous night and because he could not get his shoes on that morning he had gone to the clinic. The note from the Shawnee County Health Agency indicated claimant could return to work on June 2, 2000, with a restriction against lifting over 15 pounds until Monday June 5, 2000. Neither claimant's conversation nor the medical slip contain any mention of the cause for the pain or that it was related to work. Such information does not constitute notice of the time, place and particulars of an accident.

The dispositive finding is whether claimant had just cause to fail to provide notice until July 12, 2000, which would be within 75 days after the date of accident. Claimant admitted that he was aware of the requirement to notify the respondent of any workplace accident. Claimant further testified he believed he had provided notice to the respondent when he gave the supervisor the medical slip.

The Board finds that it is more probably true than not that claimant did speak with the warehouse supervisor on June 2, 2000, after receiving the medical slip. The Board also finds that claimant believed he had notified respondent of his back injury by presenting the June 2, 2000, medical slip and speaking with the supervisor. The Board further finds and concludes that because of claimant's inability to converse in English the warehouse supervisor did not understand that claimant had injured his back at work the night before.

Although the conversation did not constitute notice, the fact the conversation occurred, when coupled with claimant's inability to converse in English combine to establish just cause under the facts of this case. The Board agrees with the ALJ that just cause existed and, therefore, claimant had 75 days to report the accidental injury.

Respondent next argues claimant failed to meet his burden of proof to establish accidental injury arising out of and in the course of his employment. This argument is premised upon the fact that the medical records of claimant's contemporaneous treatment contain no reference to a work-related injury.

Claimant testified he experienced an onset of pain lifting boxes at work on June 1, 2000. Although the medical record from Shawnee County Health Agency does contain a notation of back pain for five days with no history of trauma, claimant denies he indicated he had back pain for five days. Claimant further noted that although he had agreed with the doctor that he had no history of trauma, he did not know what the phrase "history of trauma" meant.

When claimant sought treatment with Dr. Kleiner on June 13, 2000, he indicated an onset of pain two weeks prior while lifting boxes. The medical records after that office visit all refer to an onset of pain from lifting boxes.

The ALJ concluded and the Board agrees, the inconsistencies noted in the medical records do not outweigh claimant's testimony because the minimal inconsistencies are easily explained by the difficulties claimant experienced communicating in English. The Board concludes claimant met his burden of proof to establish a work-related injury arising out of and in the course of his employment with respondent.

Claimant requests interest and penalties under K.S.A. 44-512b which states in part:

> (a) Whenever the administrative law judge or board finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto.

In this case, there was a dispute regarding claimant's entitlement to benefits as respondent denied claimant suffered accidental injury arising out of and in the course of his employment and primarily denied claimant gave timely notice of the accident. After a preliminary hearing, the ALJ determined claimant had suffered a compensable accidental injury and notice was timely because claimant had just cause for providing notice outside of 10 days but within 75 days. The Board affirmed those findings. Claimant argues

respondent presented no additional evidence at regular hearing and there was no just cause for respondent to deny payment of the compensation claimed prior to the award. The Board disagrees.

Before interest may be awarded there must be an absence of just cause or excuse for failing to pay benefits before the award. Here, the respondent had a legitimate argument in its defense and, therefore, just cause for not paying benefits. A preliminary hearing finding is not binding and may be modified upon a full hearing of the claim.[4] Accordingly, respondent continued to have a legitimate argument in defense of the claim even after receiving an adverse preliminary hearing ruling from the ALJ and the Board. It should be noted an appeal from a preliminary award may be heard and decided by a single member of the Board.[5] Such review by a single Board member may or may not reflect the opinion of the full Board upon review after an award is rendered by the ALJ following a full hearing on the claim. Lastly, the ALJ noted and the Board agrees that additional evidence was provided at the full hearing on this claim. The Board finds, pursuant to K.S.A. 44-512b, that there was just cause for respondent's failure to pay benefits prior to the Award, and interest and penalties are not appropriate.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated June 17, 2002, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

[4] K.S.A. 44-534a(a)(2).

[5] K.S.A. 44-551(b)(2)(A).

c: Chris Miller, Attorney for Claimant
John Carpinelli, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Director, Division of Workers Compensation